Four B Corp. d/b/a Price Chopper *and* United Food and Commercial Workers Union, Local 576, affiliated with United Food and Commercial Workers International Union, AFL–CIO, CLC. Cases 17–CA–17232 and 17–CA–17299

November 8, 1997

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS FOX AND HIGGINS

On April 1, 1996, Administrative Law Judge Richard J. Linton issued the attached decision. The General Counsel and the Charging Party filed exceptions and supporting briefs, and the Respondent filed an answering brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

1. The complaint alleges that the Respondent violated Section 8(a)(1) by discriminatorily prohibiting union representatives from soliciting and distributing to the Respondent's off-duty employees on the sidewalks and parking lots outside its stores in Roeland Park, Kansas, and Grandview, Missouri, while permitting nonunion solicitations and distributions in those stores and on the adjacent sidewalks. The judge found that the Respondent had, in fact, allowed certain nonunion organizations, but not the Union, to solicit on the stores' premises. He also found, however, that the nonunion solicitations that had been permitted were directed at the Respondent's customers rather than at its employees. The judge found that the General Counsel had failed to prove disparity in treatment because he had not demonstrated that the Union was attempting to solicit customers and because there was no evidence that any other outside organization had ever been allowed to solicit or distribute to the Respondent's employees. He therefore recommended dismissal of the complaint.

The General Counsel and the Union have excepted to the judge's finding that prohibiting the Union from soliciting off-duty employees while allowing nonunion groups to solicit customers did not amount to disparate treatment on the part of the Respondent. We find merit in their exceptions.

In *NLRB v. Babcock & Wilcox Co.*,[1] the Supreme Court held that an employer may prohibit nonemployee union representatives from distributing union literature on the employer's property if reasonable efforts through other available channels of communication will enable the union to reach the employees with its message, provided that the employer ''does not discriminate against the union by allowing other distribution.''[2] The Board has consistently found 8(a)(1) violations when employers allowed nonunion organizations to engage in solicitation and distribution on the employers' property while denying the same privilege to unions.[3]

We note initially that the record does not support the judge's finding that the nonunion solicitations the Respondent had permitted on its premises were directed at its customers instead of its employees. No witness testified that the nonunion organizations limited their solicitations to customers. Indeed, most of the solicitation activity was engaged in by groups that generally accept donations from anyone passing by. Moreover, much of this solicitation took place at or near store entrances, where employees would normally be expected to enter and leave the stores.[4] We therefore find that the Respondent allowed nonunion groups to solicit its off-duty employees outside the stores and that, by denying the same privilege to the Union, it violated Section 8(a)(1).[5]

But even if the nonunion groups that were allowed to solicit on the Respondent's property, and the Union, which was not, were attempting to reach different audiences, as the judge found, we would reach the same

[1] 351 U.S. 105 (1956).

[2] Id. at 112. See also *Sears, Roebuck & Co. v. San Diego County District Council of Carpenters*, 436 U.S. 180, 205 (1978). The Court in *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992), did not retreat from its earlier statements that employers may not devise access policies that discriminate against union solicitation and distribution. The Respondent's contention that the Union had alternative nontrespassory means of contacting the employees is irrelevant here, where the complaint alleges discrimination against union solicitation.

[3] See, e.g., *Dow Jones & Co.*, 318 NLRB 574 (1995), enfd. mem. 100 F.3d 950 (4th Cir. 1996); *Be-Lo Stores*, 318 NLRB 1 (1995), enf. denied in relevant part 126 F.3d 268, 280–281 (4th Cir. 1997); *Big Y Foods*, 315 NLRB 1083 (1994).

[4] Thus, union organizer Hedges testified that he saw Salvation Army representatives soliciting in front of both the Respondent's Roeland Park and Grandview stores, and the General Counsel introduced photographs of Salvation Army representatives soliciting at the entrance to the Roeland Park store. The Respondent's former store managers testified that representatives of the Shriners solicited ''out front'' of the Roeland Park store and in the entryway of the Grandview store.

[5] The Respondent and our dissenting colleague argue that the General Counsel has the burden to show that nonunion groups actually solicited off-duty employees and that the General Counsel has failed to make such a showing. Such a showing is not necessary to prove discrimination. Under longstanding Board precedent, an employer violates Sec. 8(a)(1) by denying union representatives access for Sec. 7 activity while granting access to other outside groups, individuals and activities. For example, in *Food Lion, Inc.*, 304 NLRB 602 (1991), the employer, like the Respondent, had allowed a number of community organizations to solicit and distribute on its property but refused to allow the union to solicit off-duty employees in the common areas adjacent to its stores. The Board found that the employer had unlawfully discriminated against the union without the need to explicitly consider whether discrimination could be found if the union and the other outside organizations sought to solicit different audiences. Chairman Gould notes that our dissenting colleague would apparently overrule this line of cases.

conclusion in this case. The complaint alleges only that the Respondent violated the Act by discriminatorily refusing to allow the Union to solicit off-duty employees on the sidewalks and parking lots outside the stores. In these circumstances, we find no material distinction between the Respondent's off-duty employees and its customers. In our view, an employer that denies a union access to off-duty employees, while regularly allowing nonunion organizations to solicit and distribute literature on its property, in effect discriminates against union solicitation based on its content, and therefore violates Section 8(a)(1).[6]

In this regard, we note that the Respondent's written no-solicitation policy does not address the situation presented here. The policy states that:

> In the interest of efficiency, convenience and the continuing good will of our customers, and for the protection of our team members,[7] there must be no solicitation or distribution of literature of any kind by any team member during the actual working time of the team member soliciting or the team member being solicited.
>
> Persons who are not Company team members may not solicit or distribute literature for any purpose in any customer service area, working area or any area restricted to Company team members.
>
> There must be no solicitation or distribution of literature of any kind by persons in customer service areas or shopping areas of the store during those hours when the store is open for business.

Thus, the Respondent's stated policy forbids solicitation and distribution (1) by and between employees during actual working time; (2) by nonemployees in customer service areas, working areas, or areas restricted to employees; and (3) by anyone in customer service areas or shopping areas during business hours. Nothing in the written policy suggests that nonemployees are not allowed to solicit or distribute literature to off-duty employees on the sidewalks or in the parking lots adjacent to the store.[8] Thus, the union organizers' attempts to reach off-duty employees in those areas did not contravene the Respondent's stated policy.

In this context, we find no significance in the Respondent's having refused to allow other outside entities to distribute to or solicit its employees. Those instances involved attempts to contact *on-duty* employees in work areas of the stores, which were forbidden by the Respondent's established policy.[9] Here, the complaint alleges only that the Respondent discriminated against the Union by denying it access to *off-duty* employees on the sidewalks and in the parking lots adjacent to the stores.[10] As we have found, the Respondent's written policy does not forbid such attempted contacts, and the Respondent does not contend that it has ever prevented any other outside organization from contacting its employees under such circumstances. The Respondent thus had, in effect, two policies concerning solicitation. One, the written policy quoted above, prohibited all outside entities from soliciting on-duty employees in certain defined areas during specified times. The other, unwritten policy, hastily implemented in the face of the Union's organizing effort, precluded unions from soliciting its employees, whether on duty or off duty, anywhere on its property at any time. By denying the Union access to its off-duty employees on the exterior sidewalks and in the parking lots under the latter policy, the Respondent discriminated against the Union in violation of Section 8(a)(1).[11]

In so finding, we do not suggest that an employer may not lawfully exclude union organizers from contacting employees on its property in the absence of a published rule to that effect. However, we think that when an employer, like the Respondent, has a published rule prohibiting solicitation under stated circumstances, and excludes a union from its property under materially different circumstances in which no other outside organization has been excluded, it is fair

[6] See *Riesbeck Food Markets*, 315 NLRB 940, 941–942 (1994), enf. denied 91 F.3d 132 (4th Cir. 1996). See also *Food Lion*.

[7] ''Team members'' is the term the Respondent uses for its employees.

[8] ''Customer service areas,'' ''working areas,'' ''shopping areas,'' and ''areas restricted to [employees]'' are not specifically defined. However, a commonsense construction of those terms would not encompass external sidewalks and parking lots, and the Respondent does not contend otherwise. If the Respondent had intended to prohibit solicitation and distribution throughout its premises, including those external venues, we suppose it would have said so.

[9] Although the Respondent's written no-solicitation policy did not expressly forbid outside organizations to contact on-duty employees, we believe that such a restriction was implicit given that the policy did prohibit such contacts by employees. In any event, the Respondent consistently prohibited outside organizations from contacting its on-duty employees.

[10] While the union representatives first tried to approach employees who were on duty and/or in working areas, the complaint does not allege that the Respondent acted unlawfully when it refused to allow them to do so. By completely excluding the union organizers from its premises, however, the Respondent denied them access to off-duty employees away from working areas as well as to on-duty employees in work areas.

[11] For the foregoing reasons, we reject the dissent's contention that the Respondent lawfully excluded the union organizers because it prohibited outside organizations from contacting any of its employees.

The dissent's suggestion that the Union would have been allowed to solicit customers concerning a labor dispute is simply fanciful. The Respondent makes no such claim. Indeed, it strenuously argues that it excluded from its property many other organizations that wished to contact its customers. The Respondent thus exercised complete discretion over which outside organizations would be allowed to solicit on its property and which would be excluded.

to infer, as we do here, that a discriminatory motive lies behind the exclusion.[12]

2. The Respondent argues that, in any event, the nonunion solicitation which it permitted was not extensive enough to preclude it from denying access to the union representatives. We find no merit to that argument. Although the Board has held that an employer that has allowed only a small number of isolated ''beneficent acts'' as narrow exceptions to a no-solicitation policy does not violate Section 8(a)(1) by forbidding union solicitation,[13] we find that the exceptions the Respondent made to its no-solicitation policy were too extensive to enable the Respondent to deny access to the Union on similar terms.

Thus, despite having excluded numerous groups besides the Union from the stores' premises, the Respondent allowed the Salvation Army to solicit at both its Roeland Park and Grandview stores on a daily basis between Thanksgiving and Christmas 1993. The Shriners were permitted to solicit contributions in support of their circus and rodeo at both stores during 1993; the organization's representatives appeared at the Roeland Park store three to four times a week for a period of 3 to 4 months, and at the Grandview store one weekend per month for an equivalent period. Also in 1993, a community group sold tickets for a pancake supper at the Roeland Park store on one occasion, and a Cub Scout pack sold mugs or cups to raise money at the Grandview store on one occasion. Having permitted nonunion groups to solicit on its property to that extent, the Respondent cannot successfully contend that it has made only a small number of isolated exceptions to its no-solicitation policy.[14]

3. The Respondent raises a number of other arguments in its defense, none of which we find meritorious. First, it suggests that the union representatives were barred from soliciting on the sidewalks and parking lots because, in earlier attempts to solicit in the stores while employees were working, they allegedly threw union literature around the stores and on the floor, pushed past customers in the checkout lines, and otherwise misbehaved. There is no record support for that argument. No witness indicated that the asserted misconduct played any part in the decision to exclude the union representatives from the sidewalks and parking lots.[15]

The Respondent also argues that, unlike the union representatives, the nonunion groups who were allowed to solicit on store property had first asked permission. That argument is unpersuasive. There is no mention in the Respondent's written no-solicitation policy of any requirement to obtain permission before attempting to solicit at times or in areas in which the policy does not prohibit solicitation. No witness testified that the Union's representatives were told that they were being denied access to the Respondent's outside nonwork areas because they had not first asked permission. Nor does the Respondent contend that it would have permitted the Union to solicit on its property if the Union had only asked permission.

For all the foregoing reasons, we find that the Respondent violated Section 8(a)(1) by discriminatorily excluding the union representatives from soliciting and distributing to off-duty employees on the sidewalks and parking lots of its Roeland Park and Grandview facilities.

4. The General Counsel and the Union request that, in addition to the usual injunctive relief, the Respondent be affirmatively required to allow the Union to solicit its off-duty employees on the sidewalks and in the parking lots adjacent to its Roeland Park and Grandview stores. We find merit in this request.

Usually, when an employer has unlawfully refused to allow union access to its facilities, the Board orders only that the employer cease and desist from the unlawful conduct.[16] The Respondent, however, has re-

[12] The dissent relies on *Riesbeck Food Markets v. NLRB*, 91 F.3d 132, and *Guardian Industries v. NLRB*, 49 F.3d 317 (7th Cir. 1995), in which the courts found that employers had not unlawfully discriminated against union solicitations. Although we continue to adhere to the Board's decisions in those cases, we note, in any event, that the facts of those cases are distinguishable from this one. In *Riesbeck*, the union attempted to picket and handbill on the employer's premises with a ''do not patronize'' message. The employer excluded the union pursuant to a consistently enforced rule denying access to anyone seeking to disseminate such messages. Moreover, the employer in *Riesbeck* had allowed nonemployee union organizers to solicit and recruit employees in an organizational campaign on company property. In *Guardian Industries*, the employer allowed only ''swap and shop'' notices to be posted on its bulletin board, and refused to allow the posting of notices of union meetings as inconsistent with its policy. As we have shown, no such neutral rule or policy is applicable here. See also *Be-Lo Stores*, 318 NLRB at 11–12, distinguishing *Guardian Industries* and *Perry Ed. Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37 (1983). In any event, none of the cited cases dealt with claims that nonemployee union organizers and nonunion outside groups were attempting to solicit different audiences.

[13] See, e.g., *Hammary Mfg. Corp.*, 265 NLRB 57 fn. 4 (1982).

[14] See *Riesbeck*, supra, 315 NLRB at 941, in which the Board found that the employer unlawfully refused to allow the union access to its stores when it had allowed nonunion groups to solicit for almost 2 months during the same year.

[15] We also reject the Respondent's suggestion that the union representatives were not, in fact, prevented from soliciting and distributing outside the Roeland Park store. Union representative Meszaros testified that he handed literature to an employee after having been told to leave the premises. On rebuttal, however, former Roeland Park Store Director Staley testified that when the union representatives, presumably including Meszaros, started to solicit at the front door, she told them they would have to leave and go to the outside of the parking lot. Meszaros also testified that after all the union representatives came out of the store, they all went back to their cars. The record thus does not support the Respondent's contention that the union representatives were actually allowed to continue soliciting outside the store.

[16] See *Big Y Foods*, 315 NLRB 1083 fn. 3 (1994), in which the Board denied the sort of affirmative relief requested here.

vised its no-solicitation policy to allow no exceptions for any outside group, and there is no allegation that this change in policy was unlawful. We agree with the General Counsel and the Union that, in these circumstances, simply to order the Respondent to cease and desist from discriminatorily denying access to the Union would be a meaningless remedy, because the Respondent could continue to exclude the Union pursuant to its policy of making no exceptions to its no-access policy. The Respondent thus would succeed in foreclosing any meaningful remedy for its unlawful denial of access to the Union during a period in which it allowed nonunion groups to solicit on its premises.[17] To avoid this anomaly, we shall order the Respondent to afford the Union access to its Roeland Park and Grandview facilities during the 60-day notice posting period.

ORDER

The National Labor Relations Board orders that the Respondent, Four B Corp. d/b/a Price Chopper, Kansas City, Kansas, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discriminatorily prohibiting representatives from United Food and Commercial Workers Union, Local 576, affiliated with United Food and Commercial Workers International Union, AFL–CIO, CLC, from communicating with the Respondent's off-duty employees on the sidewalks and parking lots adjacent to the Respondent's stores in Roeland Park, Kansas, and Grandview, Missouri.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) For a period of 60 days beginning with the posting of the attached notice, allow representatives of the Union to communicate with the Respondent's off-duty employees on the sidewalks and parking lots adjacent to its Roeland Park and Grandview stores.

(b) Within 14 days after service by the Region, post at its facilities in Roeland Park, Kansas, and Grandview, Missouri, copies of the attached notice marked ''Appendix.''[18] Copies of the notice, on forms provided by the Regional Director for Region 17, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facilities involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at those facilities at any time since February 22, 1994.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

MEMBER HIGGINS, dissenting.

I do not agree that the Respondent discriminated against employees *based on Section 7 considerations*.

Because the National Labor Relations Act protects Section 7 activity, a policy or practice which differentiates on the basis of such activity violates the Act. On the other hand, a policy or practice which differentiates on some other basis does not.

In the instant case, the judge found that the Respondent differentiated between solicitations aimed at customers (permitted) and solicitations aimed at employees (forbidden). Thus, a union would be able to appeal to customers (e.g., with respect to a labor dispute), and a nonunion organization (e.g., the Salvation Army) could not appeal for donations from employees. Since the Respondent therefore does not differentiate along Section 7 lines, the Respondent has not violated the Act.

This position has been upheld by the courts. In *Riesbeck Food Markets*, 315 NLRB 940 (1994), enf. denied 91 F.3d 132 (4th Cir. 1996), the employer differentiated between solicitations (permitted) and appeals for a boycott (forbidden). Thus, a union could solicit employees for membership, and a nonunion organization (e.g., NAACP) could not ask for a boycott. Since the employer did not differentiate along Section 7 lines, the Fourth Circuit held that respondent's policy was not unlawful.

Similarly, in *Guardian Industries*, 49 F.3d 317 (7th Cir. 1995), the employer differentiated between ''swap and shop notices'' (permitted) and announcements of meetings (forbidden). Thus, anyone could post a ''swap and shop notice,'' and no one (unions or other organizations) could announce a meeting. Since the policy did not differentiate along Section 7 lines, the Seventh Circuit held that the policy was not unlawful.

In *Cleveland Real Estate Partners*, 316 NLRB 158 (1995), enf. denied 95 F.3d 457 (6th Cir. 1996), the Sixth Circuit went even further. It held that the term

[17] In *Big Y Foods*, by contrast, the employer had not adopted an absolute ban on solicitation by outside groups after it denied access to the union.

[18] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

''discrimination,'' as used in *NLRB v. Babcock & Wilcox Co*., 351 U.S. 105 (1956), is confined to situations where the employer favors one union over another, or allows employer-related information while barring similar union-related information. Thus, it would appear that, in the Sixth Circuit, an employer would not violate the Act even if, for example, it allowed the NAACP to solicit for membership and denied a union the opportunity to do so.

I need not go as far as the Sixth Circuit. Rather, consistent with more limited views of the Fourth and Seventh Circuits, I find no unlawful discrimination in the instant case.

My colleagues concede that the Respondent could have forbidden union agents from soliciting on-duty employees in the work areas of the stores. They say, however, that the Respondent crossed the line into illegality when it forbade union agents from soliciting off-duty employees in nonwork areas. However, by this analysis, my colleagues have missed the mark. The issue is *not* whether union agents have a statutory right to come onto Respondent's property to solicit off-duty employees.[1] Rather, the litigated issue is whether the Respondent engaged in discriminatory conduct within the meaning of *Babcock*. Where, as here, the Respondent differentiated between appeals to customers and appeals to employees, it cannot be said that the Respondent unlawfully discriminated where, as here, all employees were treated alike (on and off duty). Further, the fact that the Respondent has not shown a disruption of its business is beside the point. The Supreme Court, in *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992), has balanced the rights of union agents against the property rights of employers, and has found that, absent extraordinary circumstances or discrimination, the property right will prevail. The instant case involves only the ''discrimination'' exception. As discussed, such discrimination has not been shown.

My colleagues suggest that the nonunion groups solicited anyone who passed by, i.e., customers and *off-duty employees*, while the Union could not solicit off-duty employees. However, there is no evidence that the nonunion groups solicited any employees. As the prosecutor of a ''discrimination'' allegation, the General Counsel had the burden of proof to show disparate treatment, and he did not meet that burden here.[2] Further, even assuming arguendo that the evidence established that nonunion groups solicited off-duty employees, the result would be the same. The nonunion groups were not soliciting employees qua employees. They were soliciting anyone who passed by. By contrast, the union agents here were soliciting employees qua employees. Thus, there is no parallel between the activities of the union and nonunion groups. ''Discrimination'' requires a showing of treating similar situations differently, and there is no such showing here.

My colleagues also argue that the Respondent does not permit the Union to solicit customers. However, such solicitation is permitted under the Respondent's policy, and the General Counsel has not shown a deviation from that policy, i.e., the General Counsel has not shown a single instance in which the Respondent forbade a union to solicit a customer. As noted above, the General Counsel has the burden of showing disparate treatment. He has not met that burden.

Finally, my colleagues argue that an employer discriminates unlawfully if it allows nonunion groups to solicit customers on the property and refuses to allow unions to solicit off-duty employees on the property. In their view, this conduct ''in effect'' discriminates against union solicitation. This view is obviously incorrect. Under the Respondent's policy, a union could solicit customers (e.g., claiming that the Respondent is ''unfair''), and a nonunion (e.g., NAACP) could not approach employees (e.g., to ascertain whether racial discrimination is occurring). Thus, the ''discrimination'' is not antiunion discrimination.

In sum, because the General Counsel has not shown discrimination along Section 7 lines, I would dismiss the complaint.[3]

[1] Under *Lechmere*, it would appear that union agents do not ordinarily have that right. Compare *Hudgens v. NLRB*, 424 U.S. 507 (1976), where employees (albeit employed elsewhere) may have a right of access to the property.

[2] My colleagues rely on *Food Lion*, 304 NLRB 602 (1991). The case is clearly distinguishable. The employer there explicitly discriminated against union agents. It told its store managers to ''keep union organizers off company premises.'' In the instant case, there is no such evidence. Respondent simply drew a line between solicitation aimed at customers and solicitations aimed at employees. Neither unions nor other organizations could solicit employees, and the General Counsel has not shown that other organizations solicited employees.

[3] My colleagues argue that the Respondent's *written policy* does not expressly forbid the Union's conduct here. However, this case does not concern the Respondent's written policy. The issue is whether the Respondent's unwritten policy is unlawfully discriminatory. As discussed herein, it is not.

There is no allegation that the unwritten policy was promulgated for discriminatory reasons. Nor is there a suggestion that a policy must be in writing in order to be effective.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To chose not to engage in any of these protected concerted activities.

WE WILL NOT discriminatorily prohibit representatives from United Food and Commercial Workers Union, Local 576, affiliated with United Food and Commercial Workers International Union, AFL–CIO, CLC, from communicating with our off-duty employees on the sidewalks and parking lots adjacent to our stores in Roeland Park, Kansas, and Grandview, Missouri.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL allow representatives from the Union to communicate with our off-duty employees on the sidewalks and parking lots adjacent to our Roeland Park and Grandview stores for the 60 days during which this notice is posted.

FOUR B CORP. D/B/A PRICE CHOPPER

Stephen E. Wamser, Esq. for the General Counsel.
Robert J. Henry, Esq. (Blake & Uhlig), of Kansas City, Kansas, for the Charging Party.
John D. Dunbar, Esq. (Daniels & Kaplan), of Kansas City, Missouri, for the Respondent.

DECISION

STATEMENT OF THE CASE

RICHARD J. LINTON, Administrative Law Judge. This access case involves the Company's no-solicitation and no-distribution policy and the Government's single allegation that Price Chopper has ''selectively and disparately'' enforced the policy to the Union's detriment. I abbreviate my decision in this case because, agreeing with the essence of Price Chopper's argument, I find that there is a fatal variance between the allegation and the proof. Accordingly, finding no disparity as alleged, I dismiss the complaint.

I presided at this 1 day trial in Overland Park, Kansas, on February 6, 1996. Trial was pursuant to the June 30, 1995 order consolidating cases, consolidated complaint and notice of hearing (complaint) issued by the General Counsel of the National Labor Relations Board through the Regional Director for Region 17 of the Board.

The complaint is based on a charge filed February 22, 1994 (and later amended), in Case 17–CA–17232 by the United Food and Commercial Workers Union, Local 576, affiliated with United Food and Commercial Workers International Union, AFL–CIO, CLC (the Union, Local 576, or the Charging Party), and on a charge filed March 31, 1994, in Case 17–CA–17299 by the Union, against Four B Corp. d/b/a Price Chopper (Respondent, the Company, or Price Chopper).

In the Government's complaint, the General Counsel alleges that Price Chopper violated Section 8(a)(1) of the Act in 1994 when its store directors at Price Chopper's Roeland Park, Kansas store (by Store Director Andy Staley on February 18) and at its Grandview, Missouri store (by Store Director Bob Scott on March 30), ''selectively and disparately enforced a no solicitation rule with respect to distributions and solicitations on the sidewalks and parking lots of'' the two stores ''by prohibiting union solicitations and distributions to off-duty employees on the sidewalks and parking lots of these stores while permitting nonunion solicitations and distributions on the sidewalks of and within these stores.'' By its answer, the Company denies.[1]

The pleadings establish that the Board has both statutory and discretionary jurisdiction over Price Chopper, that Price Chopper is a statutory employer, and that UFCW Local 576 is a statutory labor organization.

For witnesses, the General Counsel called Richard W. Hedges (a union representative), Douglas C. Menapace (also a union representative), Gerald Meszaros (a lay minister and volunteer union organizer), Store Director Ethelyn ''Andy'' Staley, under FRCP 611(c), Store Director Robert C. Scott, under FRCP 611(c), and then rested. (1:100).[2] The Union then rested. (1:101). Following its motion to dismiss, which I denied (1:101–109), Price Chopper then called, as witnesses in Respondent's case-in-defense, Staley, Scott, and Store Directors Mark Thomas Selders and Gerald Brown. Price Chopper then rested. (1:134). There was no rebuttal stage.

On the entire record, including my observation of the demeanor of the witnesses, and after consideration of the helpful briefs filed by the General Counsel (who attached a proposed order and a proposed notice), the Union, and Price Chopper (who included a suggested limitation on any remedy ordered), I make these

FINDINGS OF FACT

I. PRICE CHOPPER AND THE TWO STORES

Although there is only limited pleadings or evidence on the matter, Price Chopper's attorney represents, in Respondent's opening statement at trial (1:12) and on brief (Br. at 1), that Four B Corp. (Four B) currently operates 21 retail grocery stores in the greater Kansas City area under the names of Balls, Hen House, and Price Chopper (the three names listed in the original charge). In February–March 1994, the relevant time here, Four B operated 17 retail grocery stores in the area. ''Some of these stores,'' counsel asserts in opening statement (1:12), ''are totally or partially organized by the United Food and Commercial Workers Union, and some are unorganized.''

Representations by counsel, as a party's agent, may not serve as affirmative evidence favorable to the party. *Auburn Foundry*, 274 NLRB 1317 fn. 2 (1985). They may, however, be used against the party as admissions. Such admissions may be made in position letters to the Regional Offices of

[1] All dates are for 1994 unless otherwise indicated.

[2] References to the two-volume transcript of testimony are by volume and page. Exhibits are designated GCX for the General Counsel's and JX for Joint Exhibits. No other party exhibits were identified or offered.

the Board,[3] in opening statements,[4] or in briefs.[5] The foregoing paragraph, therefore, is used here merely as a neutral factual description unless, in some respect not immediately apparent, it would serve as an admission by Respondent.

Only two of Four B's stores are involved here: the Price Chopper store located in Roeland Park, Kansas, and the Price Chopper store located in Grandview, Missouri. As an atlas reflects, and as the parties stipulated (1:9), Roeland Park and Grandview are suburbs of Kansas City. The pleadings and testimony establish that, during the events in question here, Ethelyn ''Andy'' Staley was the store director at Respondent's Roeland Park Price Chopper (1:73) and Robert C. Scott was the store director at the Price Chopper in Grandview (1:87–88). The two managers later were transferred, and Mark T. Selders succeeded Staley at Roeland Park (1:127), and at Grandview Gerald Brown succeeded Scott (1:131).

II. NO-SOLICITATION POLICY AND PAST PRACTICE

A. *Company's No-Solicitation Policy*

The parties stipulated (1:6–7) that Respondent, at least from December 1, 1993, until the present, has maintained in effect a no-solicitation policy (with copies available in office of the stores in issue here) reading as follows (JX 1):

> *NO-SOLICITATION POLICY*
>
> In the interest of efficiency, convenience and the continuing good will of our customers, and for the protection of our team members,[6] there must be no solicitation or distribution of literature of any kind by any team member during the actual working time of the team member soliciting or the team member being solicited.
>
> Persons who are not Company team members may not solicit or distribute literature for any purpose in any customer service area, working area or any area restricted to Company team members.
>
> There must be no solicitation or distribution of literature of any kind by persons in customer service areas or shopping areas of the store during those hours when the store is open for business.

The parties also stipulated (1:7–8) that, at all relevant times, the two stores in issue had notices on glass panels next to the glass doors (photos in evidence are JXs 2 and 3) stating ''No Solicitation Allowed'' (Roeland Park) and ''No Solicitation'' (Grandview) with the letters in all capitals.

B. *Past Practice*

Before and during the events here, Price Chopper permitted various civic and charitable organizations to come onto store premises and solicit customers to make donations or to buy tickets. The primary organizations were the Salvation Army and the Shriners. Price Chopper even uses its own employees to solicit customers in support of the Muscular Dystrophy Association. Various other organizations and individuals have been denied permission through the years, even when they requested permission, and were told to leave when they did not ask permission. But there is no evidence that any of this involved solicitation of employees, either working employees or off-duty employees (or employees outside the store on a break, reporting to work, or leaving work).

Unlike the situation in *Graham-Windham Services*, 312 NLRB 1199, 1208 (1993), there also is no evidence that employees engaged in, or that management was aware of, soliciting other employees at any time, including working time, on the premises, for membership in any organization, for purchases of baked goods or craft items or of raffle tickets for church bazaars, or for sales of commercial products such as Avon. There is evidence that one commercial group sought permission to come onto the Grandview premises and to distribute discount coupons to employees. Store Director Scott denied the request. (1:98).

Around late February or early March 1994, Respondent's management, by voice mail, instructed the store directors that Respondent's no-solicitation policy would have to be adhered to strictly. Since then, not even the Salvation Army or the Shriners have been permitted to solicit from customers on store property.

III. THE UNION'S ORGANIZING EFFORT

On February 18, 1994 union agents entered Price Chopper's Roeland Park and Grandview stores and began soliciting employees and distributing union literature to employees while they were working and assisting customers. Management told the agents to leave, and after the agents left, management found the stores littered with union literature. At the Roeland Park store, Store Director Staley and a security guard escorted Gerald Meszaros (a lay minister and a volunteer agent for the Union, 1:60–62) from the store. Staley then told Meszaros that he would have to distribute such literature off company property, and outside the parking lot. (1:63–64, 113, 116–117). On brief the General Counsel asserts (Br. at 14):

> The instant Consolidated Complaint (GCX 1-Q) does not allege that Respondent violated the Act by directing Union representatives out of its stores or by telling Union representatives they could not talk to employees who were working. The violation alleged here is limited to the restriction Staley admittedly imposed, telling Union representatives they had to remove themselves from the sidewalk in front of the Roeland Park store as well as its parking lot. With this restriction, there was no way Union representatives could talk to off-duty employees arriving for or leaving from work or on their breaks in front of the store.

On March 30, Grandview Store Director Scott told union representative Richard W. Hedges and union representative Douglas C. Menapace (who told Scott they were there to talk to Grandview employees in front of the store and in the parking lot as they reported to or left work or while they were on breaks) that Price Chopper had a no-solicitation policy and that Hedges and Menapace could not talk to employees on company property but would have to do so at the

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[3] *Massillon Community Hospital*, 282 NLRB 675 fn. 5 (1987).

[4] *Riverwoods Chappaqua Corp. v. Marine Midland Bank*, 30 F.3d 339, 343 (2d Cir. 1994).

[5] *Purgess v. Sharrock*, 33 F.3d 134, 143–144 (2d Cir. 1994).

[6] ''Team members'' and ''teammates'' are terms for employees. (1:81, 98).

street. When Hedges asked what Scott would do if they ignored his directive, Scott said he would call the police and have them removed. Hedges and Menapace left. (1:40–41, 53–56, 124–126). The General Counsel asserts (Br. at 15):

> By Scott's prohibition, while Respondent permitted extensive civic and charitable solicitations in front of and within its Grandview store as discussed above, Respondent discriminatorily and disparately enforced its no solicitation rule in violation of Section 8(a)(1) of the Act. *Riesbeck*, 315 NLRB at 941.

IV. REQUESTED REMEDY

For remedy, the General Counsel seeks a cease-and-desist Order, and requests an affirmative provision granting the Union access to sidewalks, roadways, and parking lots around the two stores to communicate with Price Chopper's off-duty employees for a 60-day period commencing with the posting of the suggested notice. The Union's position is consistent with this. Aside from urging dismissal, Price Chopper would limit any remedy to a posted notice inasmuch as there has been no soliciting for some 2 years.

V. CONCLUSIONS

A. *Price Chopper's Motion to Dismiss*

As earlier noted, when the General Counsel and the Union rested their cases-in-chief, Price Chopper moved for dismissal of the complaint. After hearing argument, I denied the motion. (1:100–109). Price Chopper now renews its motion. (Br. at 3, 21). When such a motion is denied at the close of the case-in-chief of the Government (and of the charging party), a respondent is put to an election. It may either rest on its motion, or it may proceed. It may not do both, for it waives the motion if it proceeds with its own case-in-defense. Accordingly, I have considered the entire record in reaching this decision. *Alexandria Manor*, 317 NLRB 2, 4 fn. 3 (1995); *AutoZone*, 315 NLRB 115, 118 (1994). Actually, as Price Chopper, in support of its motion, cites pages of the testimony during its own case-in-defense, it appears that Price Chopper contemplates that the decision will be rendered on the entire record, and not on the evidence as of the moment the General Counsel and the Union rested their cases-in-chief.

B. *The Fatal Variance*

As described earlier, the alleged disparity is that the Union has been prohibited from soliciting support from, and distributing literature to, Price Chopper's off-duty employees on the sidewalks and parking lots of the two retail stores at issue here. It is important to keep in mind that ''disparity'' means different treatment for similar conduct. In the context of this case, disparity would mean that Price Chopper, which has allowed other groups to come onto store property to solicit Price Chopper's customers, has denied the Union's request to come onto store property and to solicit Price Chopper's customers to donate money for an organizing drive or to otherwise support the Union or its causes. But the Government compares apples to baseballs when it argues that disparity means that because Price Chopper has permitted groups to solicit from its **customers**, it therefore must allow the Union, and therefore all other groups, to solicit from Price Chopper's **employees**.

As my abbreviated summary has shown, the solicitations Price Chopper has permitted have been of **customers**, not of employees. To prove disparity, and fit this case into the rule of *Riesbeck Food Markets*, 315 NLRB 940 (1994), on which the Government and the Union rely, Price Chopper would have to be accused of denying the Union the right to solicit donations from, or to handbill, Price Chopper's **customers**. But the Union's efforts here were directly organizational. That is, its efforts here focused on soliciting and distributing directly to **employees**. Because of the Union's purpose and focus, apparently, the Government alleged a *Graham-Windham Services*[7] violation of disparity of treatment as to employees. The proof offered to show disparity, however, runs to customers, a *Riesbeck Food* situation. (And no disparity as to customers was shown here because the Union was not trying to solicit or distribute to customers).

Unfortunately for the Government and for the Union, the record fails to show any evidence that Price Chopper has ever permitted an outsider organization (or employees themselves in violation of the no-solicitation policy) to solicit from or distribute to Price Chopper's employees. All such requests have been rejected by Price Chopper's management. On one occasion when another employer's representatives came into the Roeland Park store and actually tried to hire Price Chopper's employees, Staley asked the representatives to leave. She then went to the other employer and told the company that Price Chopper did not allow anyone to approach Price Chopper's teammates ''on company time.'' (1:83). Although ''on company time'' is not the full exclusion which Price Chopper has otherwise exercised, the point is that Staley ran the representatives off Price Chopper's property. In any event, I find that no disparity of the kind alleged has been proved or even supported by any evidence. I therefore shall dismiss the complaint.

CONCLUSIONS OF LAW

Respondent Price Chopper has not violated Section 8(a)(1) of the Act as alleged.

[Recommended Order for dismissal omitted from publication.]

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[7] 312 NLRB 1199, 1208 (1993).